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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF AMICUS CURIAE OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AND THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INCORPORATED

CHARLES H. LIEB
Attorney for
Association of American
Publishers, Inc. and
The Association of American
University Presses, Incorporated
Amicus Curiae
733 Third Avenue
New York, N. Y. 10017
(212) 557-9300

PASKUS GORDON & HYMAN
Of Counsel

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This brief is submitted jointly by Association of American Publishers, Inc. and The Association of American University Presses, Incorporated (AAP and AAUP respectively), with Petitioner's and Respondent's consent.

AAP is a trade association of book publishers in the United States. Its 260 member companies and subsidiaries are believed to produce 80% or more of the dollar volume of books published in the United States. Some of its members also publish scientific and technical journals. The Williams & Wilkins Company is not an AAP member.

AAUP is a not-for-profit educational membership corporation. Its 69 regular and 7 international members are

scholarly publishing divisions of colleges and universities and of other educational institutions located primarily in North and South America.

Questions Presented

1. Does the operation of comprehensive library duplication systems providing each year, one at a time to those who request them, thousands of photocopies of copyrighted articles in their entirety infringe the rights of the nonconsenting owners of the copyrights to these articles?

2. If so, is infringement avoided because the libraries are non-profit institutions, the copied articles are scientific studies useful to the work of the requesting researchers, and neither the libraries nor the researchers obtain commercial gain from the making of the photocopies?

3. If infringement would be avoided under the facts as stated in question 2, would the result be otherwise if 12% of the requests come from pharmaceutical companies and other private sector commercial organizations?

The Interest of AAP and AAUP

The interest of AAP and of AAUP in this case is twofold. It is to correct the Court of Claims' erroneous conclusions with respect to the photocopying practices of the National Institutes of Health and the National Library of Medicine (NIH and NLM respectively), which by implication affect all journal publishers. But even more importantly, it is to correct that Court's erroneous construction and application of basic principles of copyright law which threaten the operation of every segment of the publishing industry, profit and nonprofit alike.

Statement of Facts

NIH operates a central library serving 12,000 people, 4,000 of whom are professionals. It subscribes for two

copies of the Williams & Wilkins journals in suit, one copy staying in the library reading room and the other circulating among interested personnel. Demand for access is usually not met by the subscription copies and NIH therefore runs a comprehensive photocopying service for the benefit of its research staff to supply that demand. In 1970 NIH filled almost 86,000 requests, comprising about 930,000 journal pages.

NLM is a "librarians library," providing photocopies of journal articles to other libraries, government institutions, schools, hospitals, research foundations and private physicians. It also provides the same service to commercial organizations. In 1968 it supplied about 120,000 photocopies of journal articles comprising about 1.2 million pages. About 12% of these requests came from private or commercial organizations, particularly drug companies.

The Trial Judge, finding that the libraries operate comprehensive duplication systems constituting in essence a reprint service which supplants the need for journal subscriptions, held that the Williams & Wilkins copyrights in suit had been infringed and that Williams & Wilkins was entitled to be compensated therefor.

The Court of Claims reversed in a four to three decision, with two dissenting opinions. It found not merely that infringement of the Count I to Count VIII articles* had not been proved but that photocopying in the form done by NIH and NLM is fair use and should be accorded the same fair use immunity which the Court believed is available to a scholar who copies by hand for his own use.

In deciding the case on this broad ground the Court misread the copyright law and misunderstood and misapplied the judicially created doctrine of fair use.

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* Defendant conceded that within the pertinent accounting period, NIH and NLM had made at least one photocopy of each of the eight articles pleaded respectively in Counts I to VIII.

ARGUMENT

I.

The Court misread Section 1 of the Copyright Act.

The Court expressed "solid doubt" and "grave uncertainty" whether the copyright law forbids the "copying" of books and periodicals.

It expressed this doubt because of the distinction it found in the earlier Acts between the proscription against the *copying* of photographs, paintings and drawings and the *printing and publication* of books.

The current Act, however, (17 U.S.C. § 1, in effect since 1909) draws no such distinction, if any formerly existed. It gives the copyright owner the exclusive right

> "to print, reprint, publish, copy and vend the copyrighted work."

These are repetitive terms as the 1961 Report of the Register of Copyrights noted,* conferring the twofold right to *make* copies and to *publish* copies; printing and reprinting being "modes of copying," and vending "a mode of publishing." As was recently stated:

> "Of the uses to which the author (or his successor as the copyright owner) is given the exclusive rights, the most basic are the making and distribution of copies of the work."**

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* Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Committee on the Judiciary, 87th Cong., 1st. Sess., 21 (July 1961).

** Goldman, "Copyright as It Affects Libraries: Legal Implications", COPYRIGHT, Current Viewpoints on History, Laws, Legislation at 38 (A. Kent & H. Lancour eds. 1972). Mr. Goldman at the time was General Counsel to the Copyright Office. The views he expressed are his own and do not necessarily reflect those of the Copyright Office.

There is no basis for and the Court was clearly wrong in drawing a distinction between unauthorized printing and the unauthorized photocopying of a book or periodical.

II.

The Court misunderstood Section 101 of the Copyright Act.

The Court in finding that plaintiff had failed to show that NIH's and NLM's unauthorized use of its copyrighted material had damaged it and hence that such use was non-infringing simply misunderstood the relevant portions of the Copyright Act.

§ 1, as noted above, gives the copyright owner the exclusive right to make copies of the copyrighted material. One who makes unauthorized copies of the material therefore infringes the copyright, subject to the application of the fair use doctrine which we discuss in the succeeding point.

§ 101 provides that an infringer shall be liable to pay to the copyright proprietor, *"in lieu of actual damages,"* such damages as the court shall deem just. And 28 U.S.C. § 1498(b), under which this suit is brought, provides that whenever copyright is infringed by the United States, the copyright owner may sue the United States for reasonable compensation.

The issue to be determined in the first instance, therefore, is infringement and not damage. Infringement is not dependent on a showing of damages; if infringement is found, damages or compensation whether actual or statutory follow as a matter of course.

The Court applied a different standard. It said that there was inadequate reason to believe that plaintiff was or would be harmed substantially by NIH and NLM photocopying practices and hence had shown no infringement. In so doing, it employed erroneous circular reasoning and misapplied the governing statutes.

III.

The Court misunderstood and misapplied the Fair Use Doctrine.

The Court, in essence, decided that the NIH and NLM copying practices were protected by the fair use doctrine, fortifying its conclusion by suggesting that a scholar can copy for his own use and therefore that the library as his "ministerial agent" can do so for him. In so deciding, it distorted the fair use doctrine, about which the following should be noted.

(1) Fair use developed as an *author's right* to borrow from or build upon or to criticize earlier works. It was in this context that Mr. Justice Story* enumerated the classic tests which have been restated in S.1361, the proposed copyright revision bill;** namely, the purpose and character of the work; its nature; the amount used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or the value of the copyrighted work. Each is inter-related to the other, but the effect of the copying upon the copyright owner's potential market for the copyrighted work is recognized as of prime importance.

(2) Borrowing or copying for the purpose of authorship or criticism is not to be confused with the *scholar's* right to copy for his own use. Some justify this kind of copying as a *de minimis* infringement and hence not actionable. Others claim it as a right of the reader implicitly withheld from the exclusive rights granted to the author. Whichever view is taken, it is irrelevant to the issues of this case, which involve copying not by the individual scholar for himself but by the library for thousands.

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* *Folsom* v. *Marsh*, 9 Fed. Cas. 342, No. 4901 (D. Mass. 1841).

** S.1361, 93d Cong., 1st Sess. § 107 (1973).

(3) The library, and particularly a library like NIH or NLM which runs a comprehensive photocopying service for the use of its research staff or for patrons of other libraries, is a new party to the dichotomy. It neither copies for authorship, nor (except for replacement of torn or missing pages) for its own use. It copies to fulfill the requests of others.

Seemingly aware of the basic differences between an author's or a scholar's copying and library copying, the court attempted to rationalize its fair use finding by accepting in part "although not necessarily in full" the concept "that the library is nothing more than the individual requester's ministerial agent."

We cannot better demonstrate the fallacy of the argument than by quoting the following remarks of Chief Judge Cowen in his dissenting opinion:

> "This argument is so far-fetched that the majority balks at embracing it completely. It collides with reality. The libraries installed and operate the reproduction and distribution operation on their own initiative and without any kind of an agreement with the ultimate users of the copies. There is no showing that these alleged—and in the case of NLM generally unknown—principals have any say in the formulation of the policies and practices of the photocopying operation. The libraries decide, without consulting or obtaining the consent of the alleged principals, whether to loan the original of the journals or to provide photocopies. The libraries are no more the agent of the users of the material than are the venders of plaintiff's magazines and the commercial concerns which are licensed by plaintiff to make and sell copies to doctors and scientists. The essential elements of agency are wholly lacking."

(4) The "non-profit" element so much relied on by the Court is not a determinative factor of fair use. In em-

phasizing as it does that neither NIH and NLM nor the researchers who ask for copies attempt to profit or gain financially from the photocopying, the Court compounds the confusion created by its failure to distinguish between author, scholar and library.*

The Court's statement that "copying for scientific purposes (is given) a wide scope" relates to an author who builds upon or criticizes a previously published work. To him, the fourfold test incorporated in § 107 of the Senate revision bill applies, and particularly the fourth test, which is the effect of the use upon the potential market for the work that is copied from.

But even for the author, the non-profit nature of his work is not a factor. He infringes or does not infringe depending upon whether he exceeds or stays within the prescribed criteria, and the determination will be the same whether he plans to sell his work or broadcast it free. A copier who copies not for his own purposes as author, critic or scholar, but for distribution to others, by the very act of copying, infringes unless his copying is authorized by the copyright owner or is excused or condoned by the fair use principle.

Here, the non-profit character of the copier is not only irrelevant; it introduces a note of the absurd. If it were otherwise, no author or publisher would find it possible to produce a work intended for school or hospital or government use.

CONCLUSION

We think that the conclusions of the Court below were wrong and should be corrected. We think it even more important that the Court's erroneous construction and application of basic copyright law and principles should be corrected.

* It overlooks moreover that 12% of the NLM photocopying was for private sector commercial companies.

We also respectfully suggest that the interests of the parties as well as those of the entire copyright-interested community, publishers, authors, librarians and others, may be served by a determination that library photocopying prior to the date of this Court's decision should be exempt from liability but that photocopying such as that practiced by NIH and NLM after that date shall constitute infringement. Cf. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, at 106-107 (1971).

Accordingly we respectfully urge that the petition for certiorari be granted.

Respectfully submitted,

CHARLES H. LIEB
Attorney for
Association of American
Publishers, Inc. and
The Association of American
University Presses, Incorporated
Amicus Curiae
733 Third Avenue
New York, N. Y. 10017
(212) 557-9300

PASKUS, GORDON & HYMAN
Of Counsel

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